IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32651

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 429**
	)	
Plaintiff-Respondent,	)	**Filed: April 17, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
SHANA VOSS PARKINSON, aka SHANA WHITMORE and SHANA RICHARDS,	)	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Jefferson County. Hon. Gregory S. Anderson, District Judge.

Judgment of conviction for two counts of first degree murder and two counts of using a deadly weapon in the commission of the murders, affirmed.

R. James Archibald, Idaho Falls, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent. Lori A. Fleming argued.

GUTIERREZ, Chief Judge

Shana Voss Parkinson appeals from the judgment of conviction entered upon the jury verdicts finding her guilty of two counts of first-degree murder and two counts of using a deadly weapon in the commission of the murders. We affirm.

I.
FACTS AND PROCEDURE

Parkinson was charged and convicted for murdering her ex-husband, Gregg Whitmore, and his finance, Karen Cummings, at Whitmore's Jefferson County residence. In the early morning of February 1, 2004, Police responded to the scene after Cummings' young daughter called 911 and reported that an intruder had stabbed her mother and Whitmore. When police arrived at the house, they found Whitmore laying face-down in the kitchen in a pool of blood, his hand covering one of numerous bloody footprints leading from the kitchen out to the garage and

the back alley. Cummings was found dead in a pool of blood in a bedroom. Both had suffered multiple stab wounds.

While Jefferson County authorities were still at the scene of the murders, Madison County authorities received a 911 call from Parkinson. An officer responded to a convenience store near Rexburg where he found Parkinson sitting in her car barefooted, covered in blood. She claimed that she did not know where she had been or what had happened. She was taken to the hospital where police collected evidence, including her clothes and swabs of her feet. Evidence was also collected from her vehicle.

Parkinson was charged with burglary, Idaho Code § 18-1401, two counts of first-degree murder, I.C. §§ 18-4001, 4002, 4003, and two counts of using a deadly weapon in the commission of a crime, I.C. § 19-2520. She filed a motion for change of venue, asserting that the pretrial publicity associated with her case would make it difficult to seat an impartial jury in Jefferson County or in other eastern Idaho counties. After a hearing, the court transferred the case to adjacent Bonneville County.

Four days prior to trial, the district court summoned 128 potential jurors into court as part of what it called the "screening portion of the voir dire, as opposed to the voir dire itself." The court interviewed each juror individually regarding their responses to certain questions on the juror questionnaire. With counsel for both sides present and participating in the questioning, the court inquired as to any undue hardship jury service would cause and, in some instances, in regard to the juror's ability to sit as a fair and impartial juror on the case. As a result of the prospective jurors' answers, forty-four were excused from service, with the remaining reporting for jury duty the first day of trial where they were placed under oath and subjected to voir dire.

The trial commenced and after the state's last witness finished testifying, the state indicated to the court that it did not plan to call further witnesses, but requested that it have that night to "check our exhibits to make sure that we've got everything entered . . . ." The state also indicated that "we planned on resting at this point." The court granted the time to compile the exhibits and stated "we'll consider that the end of your witnesses for the State's case in chief . . . ." Since it was nearing five o'clock, the court decided it was too late for the defense to start calling witnesses and accordingly, adjourned until the next day.

The following morning, Parkinson moved for dismissal on the basis that no date as to when the crime had allegedly occurred was contained in the information. The prosecutor

responded by arguing that he had met every element of the offense and the following exchange took place:

Court:	[*addressing Prosecutor*] You may wish to move to amend your Information. The dates are not included.
Prosecutor:	In the original charging?
Court:	On the Prosecuting Attorney's Information, which was dated March 12, 2004, filed March 12, 2004, there are no dates.
Prosecutor:	Okay, we would move to amend the Information to include the date of February 1, 2004, on the Burglary and the various counts contained in the Information.
Court:	[*inquires of Defense Counsel*]
Defense Counsel:	Your Honor, I would object. The state's rested their case.
Prosecutor:	Your Honor, we indicated we would rest our case this morning after checking with the various exhibits and/or pleadings.
. . . .	
Court:	Now it's an interesting situation we found ourselves in. You moved before he rested. I guess I probably should have clarified that, but having done so--

Ultimately, the court allowed the state to amend the information and denied Parkinson's motion to dismiss.

Following trial, Parkinson was found guilty of all charges. The court entered an order merging her burglary conviction into her convictions for the felony murders of Whitmore and Cummings. The court entered judgment and imposed an aggregate unified sentence of life imprisonment, with twenty-seven years determinate. Parkinson now appeals.

II.

ANALYSIS

A. Sufficiency of the Information

Parkinson argues the district court erred in denying her motion to dismiss because the "charging document was defective." She contends that because the state had already rested, the court erred in allowing the state to amend the information to include an allegation of the date the crime occurred. Whether an information conforms to the requirements of law is a question subject to free review. *State v. Quintero*, 141 Idaho 619, 621, 115 P.3d 710, 712 (2005); *State v. Jones*, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004).

The state argues that Parkinson waived this objection by not raising it prior to trial. We agree. Idaho Criminal Rule 12(b)(2) requires that all "defenses and objections" based on defects

in the information "other than it fails to show jurisdiction of the court or to charge an offense" must be raised prior to trial. Accordingly, if the challenge is one of due process, such as whether the charging document sufficiently advises the defendant of the nature of the charge, the issue is waived if not raised prior to commencement of trial. *Quintero*, 141 Idaho at 622, 115 P.3d at 713; *Jones*, 140 Idaho at 758, 101 P.3d at 702. Since it is undisputed that Parkinson did not raise the issue until after her trial had begun, she waived any non-jurisdictional defects. Therefore, we inquire only whether the information's lack of a date rendered it insufficient to confer jurisdiction.

Subject matter jurisdiction in a criminal case is conferred by the filing of an information, indictment, or complaint alleging an offense was committed within the State of Idaho. *Quintero*, 141 Idaho at 621, 115 P.3d at 712; *Jones*, 140 Idaho at 757-58, 101 P.3d at 701-02. Since the indictment or information provides subject matter jurisdiction to the court, the court's jurisdictional power depends on the charging document being legally sufficient to survive challenge. *Quintero*, 141 Idaho at 621, 115 P.3d at 712; *Jones*, 140 Idaho at 758, 101 P.3d at 702. To be legally sufficient, an indictment or information must meet two standards:

> First, there is the question of whether an indictment or information is legally sufficient for the purpose of due process during proceedings in the trial court. Second, there is the separate question of whether an indictment or information is legally sufficient for the purpose of imparting jurisdiction.

Id. An information is not jurisdictionally defective where it contains a statement of the territorial jurisdiction of the court and cites the applicable section(s) of the Idaho Code. *Quintero*, 141 Idaho at 622, 115 P.3d at 713.

Thus, the lone absence of a date on which the crime was committed does not render an information jurisdictionally deficient. Where the information in this case alleged the crime was committed in Idaho and referenced the applicable sections of the Idaho Code, the information had no jurisdictional defect which could have been raised by Parkinson at any point in the proceedings. *See id*. (finding jurisdiction even where the information failed to allege an element of the crime and the defendant objected after the state rested). Any other objections to the information were waived once the trial commenced. We also note that first degree murder, of which Parkinson was charged, carries no statute of limitation--rendering the date of the alleged action of diminished import.

In sum, the information was not rendered jurisdictionally deficient by its omission of an alleged date of the crime. Any other objection Parkinson may have had was waived by her failure to object prior to trial. The district court did not err in denying Parkinson's motion to dismiss.

B. Venue

Parkinson argues the district court abused its discretion in declining to transfer the trial to western or northern Idaho and instead deciding that a fair and impartial jury could be seated in Bonneville County, adjacent to Jefferson County where the crime occurred. Specifically, she argues the court failed to recognize that the pretrial publicity associated with her case would make it difficult to seat an impartial jury in Bonneville County because of its proximity to the site of the crime and the fact it was home to the large media outlets in the area which covered the incident.

A motion to change venue is addressed to the discretion of the trial court. *State v. Yager*, 139 Idaho 680, 687, 85 P.3d 656, 663 (2004). A trial court's decision to try a case in a particular venue will not be deemed an abuse of discretion unless, under the totality of the existing circumstances, juror exposure to pretrial publicity resulted in a trial that was not fundamentally fair. *Id.*; *State v. Custodio*, 136 Idaho 197, 30 P.3d 975 (Ct. App. 2001). A defendant challenging a court's decision on a motion for change of venue must show there is a reasonable likelihood that prejudicial news coverage prevented a fair trial. *State v. Sheahan*, 139 Idaho 267, 278, 77 P.3d 956, 967 (2003). This Court considers the following factors when reviewing a district court's exercise of discretion regarding a motion for change of venue: the existence of affidavits indicating prejudice or an absence of prejudice in the community where the trial took place; the testimony of the jurors at jury selection regarding whether they had formed an opinion based upon adverse pretrial publicity; whether the defendant challenged for cause any of the jurors finally selected; the nature and content of the pretrial publicity; and the amount of time elapsed between the pretrial publicity and the trial. *Id.*; *State v. Winn*, 121 Idaho 850, 856, 828 P.2d 879, 885 (1992). Where it appears the defendant actually received a fair trial and there was no difficulty experienced in selecting a jury, the denial of a defendant's motion for change of venue is not a ground for reversal. *Yager*, 139 Idaho at 687, 85 P.3d at 663. Error cannot be predicated on the mere existence of pretrial publicity concerning a criminal case; rather, a defendant has the burden to show that the setting of the trial was inherently prejudicial or that

actual prejudice can be inferred from the jury-selection process. *Id*. at 687-88, 85 P.3d at 663-64.

After a review of the record, we cannot find the court abused its discretion in denying Parkinson's request to move the trial to another part of the state. In her brief to this court, Parkinson relies almost exclusively on the fact that there were additional and larger media outlets originating from Bonneville County which reported on the crime when it occurred. However, as mentioned above, the mere existence of pre-trial publicity is not grounds for error. Rather, a defendant has the burden to show that the setting of the trial is inherently prejudicial or that actual prejudice can be inferred. Here, Parkinson does not meet that burden. She provides no evidence that the publicity prevented her from receiving a fair trial, nor any reason to infer as much. *See State v. Jones*, 125 Idaho 477, 484, 873 P.2d 122, 129 (1994) (noting that defendant submitted no affidavits demonstrating community prejudice arising from the media coverage when affirming the court's refusal to change venue); *Custodio*, 136 Idaho at 203, 30 P.3d at 981 (same). Parkinson seems to imply that the reason the judge transferred the case (publicity) was more pervasive in Bonneville County than in Jefferson County; however, this is a mischaracterization of the situation. Pre-trial publicity was not the sole problem with holding the trial in Jefferson County; it was the combination of that publicity and the fact the defendant and her family were well known in what was a small community.

In regard to the impact of any publicity generated in Bonneville County as validating an inference that the jury was prejudiced, we note that during voir dire potential jurors were specifically questioned in regard to their exposure and reaction to pretrial publicity. While twenty-five of the initial forty potential jurors admitted to hearing about the case through the media, most of them stated that their exposure to the publicity occurred at or near the time of the murders, over fourteen months prior to Parkinson's trial. Additionally, of those twenty-five jurors, only one indicated there was something about his exposure to the publicity that caused him to form an opinion about the outcome in the case. That juror was dismissed for cause. *See Sheahan*, 139 Idaho at 278, 77 P.3d at 967 (In regard to questioning juror's about their exposure to pretrial publicity, "[a] prospective juror's assurance that he or she is impartial is a consideration in reviewing the record . . . ."). *See also State v. Bryant*, 127 Idaho 24, 27, 896 P.2d 350, 353 (Ct. App. 1995) (affirming the district court's denial of a motion to change venue and noting that during voir dire no juror was found objectionable because of an opinion formed

as a result of pretrial publicity). We also note that once the jury was seated, Parkinson did not challenge any of the jurors for cause, a fact which had been found to indicate satisfaction with the jury as finally seated. *See id.* (noting that the defendant had not challenged any of the jurors for cause after the jury was finally seated when determining the court did not abuse its discretion in refusing to change venue); *State v.Hyde*, 127 Idaho 140, 145, 898 P.2d 71, 76 (1995) (same); *Custodio*, 136 Idaho at 203, 30 P.3d at 981 (same).

The record fails to show that the location of the trial was inherently prejudicial, nor is there evidence pointing towards a likelihood that the jury was actually prejudiced by pre-trial publicity. On the contrary, the district court, familiar with both communities, the defendant's and victims' families' ties to those communities, and the communities' news dissemination, made a reasoned, rational decision supported by the record that Parkinson would receive a fair trial in Bonneville County. We conclude the decision was not an abuse of discretion.

C. Juror Screening

Parkinson asserts that the district court's action of summoning a group of jurors to court as part of what it characterized as a "screening portion of the voir dire, as opposed to the voir dire itself," where it interviewed prospective jurors individually regarding their responses to certain questions on the juror questionnaire without administering an oath, was a violation of the Uniform Jury Selection and Service Act, I.C. § 2-201, *et. seq*., and her right to due process.

The state argues that because Parkinson did not object to the procedure at the time, she has waived the issue on appeal. *See* I.C. 19-2006 ("A challenge to the panel must be taken before a juror is sworn, and must be in writing, and must plainly and distinctly state the facts constituting the ground of challenge."); I.C. § 2-213(1) (a party alleging a substantial failure to comply with the Uniform Jury Selection and Service Act must raise the issue by motion prior to the jury being sworn to try the case); *State v. Hansen*, 127 Idaho 675, 678, 904 P.2d 945, 948 (Ct. App. 1995) ("[A] challenge to a jury panel or individual juror because of errors or discrimination during the jury selection process must be made before the jury is empanelled."). Recognizing that Parkinson did not object prior to the jury being impaneled, absent a showing of fundamental error we will not consider this issue on appeal. *Hansen*, 127 Idaho at 678, 904 P.2d at 948.

We need not reach a fundamental error analysis, however, because Parkinson fails to show that the district court committed error, let alone fundamental error. Both the Idaho Code

and Idaho Criminal Rules provide for questioning by the court or its representatives to determine whether a prospective juror should be dismissed or have his service postponed. Neither mentions that an oath is required prior to such questioning. *See* I.C. § 2-212(1) ("The court, or a member of the jury commission designated by the court, upon request of a prospective juror or upon its own initiative, shall determine on the basis of information provided on the juror qualification form or *interview* with the prospective juror or other competent evidence whether the prospective juror should be excused from jury service or have their jury service postponed.") (emphasis added); Idaho Criminal Rule 24(b) allows for voir dire examination of prospective jurors and states that such an examination "shall be under the supervision of the court and subject to such limitations as the court may prescribe," but makes no mention that jurors must be under oath during the process. Idaho Code Section 2-208(3) states: "The juror qualification form shall contain the prospective juror's declaration that his responses are true to the best of his knowledge and his acknowledgment that a willful misrepresentation of a material fact may be punished as a misdemeanor." It appears that the district court here employed the screening of prospective jurors to supplement the information gathered through the juror qualification form. Although we do not endorse the use of a screening process, particularly where a murder charge is involved, the record does not indicate any non-compliance with the statutes or rules governing jury impaneling.

We also note that even if Parkinson had shown the court's questioning without administering an oath was fundamental error, we would conclude the error was harmless. *See State v. Christiansen*, 144 Idaho 463, 471, 163 P.3d 1175, 1183 (2007) (noting that fundamental error can be harmless). The main thrust of the questioning at issue was to ferret out jurors who would be unable to sit on the case due to hardship or the inability to be impartial. Thus, despite how the questioning occurred, Parkinson would carry a difficult burden to show that her trial was rendered unfair by the court's initiative in actively attempting to eliminate biased jurors.

D. Footprint Expert Testimony

Parkinson also contends the district court erred in allowing the testimony of the state's "footprint" expert, Sergeant Robert Kennedy, that Parkinson's footprint had characteristics strongly resembling a footprint at the crime scene. Specifically, she argues that the presentation of such testimony exceeded the scope of the court's pretrial order restricting the expert from testifying as to his conclusion regarding whether the footprints matched.

After ruling that Sergeant Kennedy was qualified as an expert, the trial court placed certain limitations on his testimony, saying:

> I think he can testify about his research, about what he's observed, about what he finds with respect to footprints, how the footprints of the defendant compare to the footprints that he observed. Even, I would go so far as to say he could testify with regard to the similarity of the footprints and the probability [of] the footprints at the scene being made by the defendant.
>
> . . . .
>
> [A]s I understood his testimony . . . you could only find that [footprints] were made by the suspect if they were unique, something unique about the foot, a scarring or something of that nature.
>
> Absent something like that, I'm not going to allow him to get up and say, these are the defendant's footprints. I think he has to stick with, there's no support, some support, or strong support for them being [the] defendant's footprints. . . .
>
> I think all he can do is, basically, compare what he saw to . . . her footprint and then give us some kind of generality that they compare in the following respects, and outline those respects, which then provides some support or lack of support.

At trial, when asked by the prosecutor whether he had "formed an opinion to a reasonable degree of forensic certainty," Sergeant Kennedy replied:

> I found that the evidence was strong looking at the crime scene impression. So I found strong support to the proposition that the person who made the blood stained impression at the crime scene also made the impression on the roll of paper here in the courtroom.

Even assuming, without deciding, the issue was preserved for appeal (which the state alleges it was not, since Parkinson did not object at trial) and that the expert's testimony exceeded the boundaries of the court's pretrial order, we conclude it would be harmless error given the overwhelming evidence of Parkinson's guilt that was presented at trial.

An error is considered harmless if an appellate court is convinced beyond a reasonable doubt that the same result would have been reached had the evidence been properly excluded. *State v. Hodges*, 105 Idaho 588, 592, 671 P.2d 1051, 1055 (1983); *State v. Hoisington*, 104 Idaho 153, 160-61, 657 P.2d 17, 24-25 (1983); *State v. LePage*, 102 Idaho 387, 396, 630 P.3d 674, 683 (1981). Thus, the inquiry here is whether we are convinced beyond a reasonable doubt the jury would have found Parkinson guilty absent the expert's testimony that there was "strong support to the proposition that the person who made the blood stained impression at the crime scene also made the impression on the roll of paper here in the courtroom."

During trial, there was a significant body of evidence presented connecting Parkinson to the murders. At the crime scene, her fingerprint was discovered on a flashlight that had presumably been used to illuminate her surroundings in Whitmore's dark house. Blood was found in the kitchen and garage which, when tested, contained her DNA. In the alley behind Whitmore's house, police found a single "Huck" brand shoe which had both Whitmore's and Parkinson's blood on it. A witness testified that she had seen Parkinson wearing identical shoes in the months prior to the murders. This witness also testified that approximately one week before the murders, Parkinson told her that "she wished [Whitmore] was dead."

When police responded to Parkinson's 911 call on the night of the murders, they found her in her car, covered with blood and claiming that she did not know where she had been. Some of the blood on Parkinson's clothing and feet was identified as Whitmore's. In Parkinson's car, police found a "Fiskars" brand knife sheath and bloody napkins. Subsequently, in the Snake River, near a campground Parkinson would have had to pass on her way from the crime scene to where she was found in her car, officers found a "Fiskars" brand knife matching the sheath they had already discovered, as well as a shoe that was the mate of the "Huck" brand shoe found at the crime scene. At the campground itself, bloody napkins were found that tested positive for Parkinson's DNA and matched the soiled napkins found her vehicle.

Given the amount and nature of evidence linking Parkinson to the murders, we conclude beyond a reasonable doubt that a jury would have found her guilty even if Sergeant Kennedy had not offered his assertion that there was strong evidence linking the bloody footprints found at the scene to Parkinson's footprint. Consequently, even if admission of the testimony was erroneous, it was harmless.

E. Prosecutorial misconduct

Parkinson argues the prosecutor committed misconduct in his closing argument that prejudiced her right to a fair trial. Specifically, she argues the prosecutor improperly appealed to the juror's sympathy and emotions as well as improperly emphasized inadmissible evidence.

The prosecutor's statements to which Parkinson refers are as follows:

> I'm also extremely humbled to be able to represent the victims' family, and I hope that anything I've said or done in the last few weeks would not disturb the memory of [the victims].
>
> . . . .

> And here is the footprint to the kitchen and out towards the garage door. And, of course, we talked extensively about these footprints, as you know, and why they were the defendant's footprints. . . .
> . . . .
> And we wanted to show you this for the presentation of Mr. Kennedy of the Royal Canadian Mounties so you can see what he did in his analysis. . . .
> . . . .
> Sergeant Robert Kennedy, he was brought to show you the comparisons of the footprints and why they matched. And just in lay language, I'd like to explain what he talked about. He took the known footprint and then put it on all of the unknowns. And then he took all of the unknowns and put it back on the knowns for both the right and the left foot to show they matched and the defendant's known footprints matched her footprint at the crime scene.

It is undisputed that Parkinson did not object to the statements at trial. When a defendant fails to timely object to alleged improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only when the conduct is sufficiently egregious to result in fundamental error. *State v. Phillips*, 144 Idaho 82, 88, 156 P.3d 583, 589 (Ct. App. 2007). Such error is fundamental only if it is calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. *Sheahan*, 139 Idaho at 280, 77 P.3d at 969; *State v. Babb*, 125 Idaho 934, 942, 877 P.2d 905, 913 (1994). More specifically, prosecutorial misconduct during closing arguments will constitute fundamental error only if the comments were so egregious or inflammatory that any consequent prejudice would not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded. *Sheahan*, 139 Idaho at 280, 77 P.3d at 969; *State v. Cortez*, 135 Idaho 561, 565, 21 P.3d 498, 502 (Ct. App. 2001).

In regard to the prosecutor's statements on the footprint expert's testimony, we conclude there was no error, let alone fundamental error. Prosecutors have considerable latitude in closing argument and are entitled to discuss fully, from their standpoint, the evidence and the inferences to be drawn therefrom. *Sheahan*, 139 Idaho at 280, 77 P.3d at 969. Thus, where Sergeant Kennedy's testimony had been properly admitted into evidence, the prosecutor was entitled to discuss the evidence from his viewpoint and argue valid inferences stemming from it--he did not depart from those strictures here.

On the other hand, it was clearly error for the prosecutor to imply in closing statements that he was representing the victims' families. However, given our assessment above of the

overwhelming evidence of Parkinson's guilt, we conclude that even assuming the prosecutor's statement was fundamental error, it was harmless. Given the relatively benign nature of the comment, it would not have altered the verdict where a plethora of convincing physical and circumstantial evidence linked Parkinson to the murders.

III.

CONCLUSION

The district court did not err in denying Parkinson's motion to dismiss based on her contention that the information was insufficient, nor did the court err in transferring venue to Bonneville County as opposed to a location out of eastern Idaho as Parkinson requested. Conducting a juror "screening" without placing jurors under oath, while not advisable, was not in contravention of the Idaho Code or Idaho Criminal Rules, and even if it had been error to do so, it would be harmless. Likewise, even if the state's footprint expert exceeded the bounds of admissibility in his testimony, the error would be harmless given the significant body of evidence presented at trial connecting Parkinson to the murders. Finally, we conclude the prosecutor did not commit misconduct by commenting on the footprint expert's testimony, and while it was improper for him to make reference to his representing the victims' families, that error was nonetheless harmless. Parkinson's judgment of conviction for two counts of first degree murder and two counts of using a deadly weapon in the commission of the murders is affirmed.

Judge LANSING and Judge PERRY **CONCUR**.